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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. GREGORY FRED ZIELESCH, Defendant and Appellant.	C059872 (Super.Ct.No. 057249)

APPEAL from a judgment of the Superior Court of Yolo County, Stephen L. Mock, Judge. Affirmed.

Stephen Gilbert, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman, Supervising Deputy Attorney General, and Clara M. Levers, Deputy Attorney General, for Plaintiff and Appellant.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, IV, VI & VII.

The tragic loss of life in this case illustrates the danger that faces law enforcement officers every day, even during what on the surface appear to be routine encounters.

Defendant Gregory Fred Zielesch bailed Brendt Volarvich out of jail and asked that, in return, Volarvich kill Doug Shamberger, who had been sleeping with defendant's wife. Volarvich agreed but needed a "piece" to carry out the hit. Defendant provided Volarvich with a .357 magnum revolver and $400 to purchase some methamphetamine. The next day, while driving back to defendant's house, Volarvich was stopped by California Highway Patrol Officer Andrew Stevens for a traffic violation. High on methamphetamine and afraid of being sent back to jail, Volarvich shot and killed Officer Stevens with defendant's gun when the officer walked up to the driver's window and greeted Volarvich with a friendly, "How are you doing today?"

Defendant was convicted of the first degree murder of Officer Stevens, conspiracy to commit the murder of Doug Shamberger, and other offenses and enhancements not relevant to the issues raised on appeal. He was sentenced to state prison for an indeterminate term of 50 years to life (two consecutive terms of 25 to life), plus a consecutive determinate term of seven years. He appeals.

In the published parts of this opinion, we reject defendant's contentions that his murder conviction must be reversed because the shooting of Officer Stevens was not in furtherance of the conspiracy to kill Shamberger and "was both unforeseen and unforeseeable," and that the entire judgment must be reversed because he was denied his right to a fair trial when the judge allowed courtroom spectators

to wear buttons displaying a color photograph of Officer Stevens for six days at the start of trial.

As we will explain, when defendant bargained for the assassin's services and armed him with a gun and money to buy methamphetamine, defendant knew that the assassin had an unstable personality, with the "mentality" to kill someone other than the intended victim of the assassination. Defendant also knew that the assassin had just been released from jail, was on searchable probation, and would not want to be returned to custody if a law enforcement officer found the assassin in possession of methamphetamine and defendant's gun. From these facts, jurors reasonably could conclude the cold-blooded murder of Officer Stevens was a natural and probable consequence of the conspiracy to kill Shamberger because a reasonable person, knowing what defendant knew, would recognize that if the unstable, methamphetamine using, and armed assassin were detained by a law enforcement officer before the assassination was completed, it is likely that he would kill the officer to avoid arrest and complete his mission.

And it is an insult to the intelligence and integrity of jurors to suggest that, despite the judge's admonition not to be influenced by buttons worn by some of the courtroom spectators, the jurors would have been so influenced by the buttons that they would be unable to base their verdict solely on evidence presented at trial. Nothing about the buttons was coercive or intimidating, and we have no doubt that the verdicts would have been the same if the trial court had not allowed the spectators to wear the buttons during the first six days of this eight-week trial.

In the unpublished parts of our opinion, we reject defendant's other claims of reversible error. Consequently, we shall affirm the judgment.

FACTS

On the afternoon of November 17, 2005, Officer Stevens stopped Volarvich on a road outside of Woodland, California. Stevens approached the vehicle, lowered his head towards the driver's side window, and greeted Volarvich with a friendly, "How are you doing today?" Volarvich responded, "Pretty good," then shot Stevens in the face with a Taurus .357 magnum revolver. Death was instantaneous. Stevens collapsed on the side of the road, and Volarvich drove away.

The events that culminated in the murder of Officer Stevens began three days earlier at a motel in Woodland, where Volarvich and his girlfriend, Rebecca Pina, were staying. After a night of using methamphetamine, they failed to check out of the motel at the scheduled time on November 14. Woodland police officers, summoned to evict the holdover tenants, discovered marijuana on Pina and brass knuckles and methamphetamine on Volarvich. The officers arrested Volarvich.

Pina, who had been involved in an intimate relationship with defendant, drove Volarvich's car to defendant's house and asked for help with bail for Volarvich. Defendant reluctantly agreed and ultimately arranged a deal with a local bail bondsman whereby defendant would co-sign for the full amount of the $10,000 bond and pay $300 of the $1,000 bond premium, and Volarvich would pay the remaining $700 after he was released from jail.

When Volarvich was released from jail on November 16, defendant and Pina took Volarvich to defendant's house, where they "got high" on methamphetamine with Lindsey Montgomery, one of Pina's friends.

That afternoon, Volarvich and Pina gave defendant a ride to the Yolo County courthouse, where defendant attended a custody hearing regarding defendant's children with his estranged wife, Michelle. Michelle was living with Doug Shamberger, whom defendant "hated" and considered to be an "asshole." Defendant suspected that both Michelle and Shamberger had burglarized his house; and Shamberger had threatened defendant several times because Michelle paid periodic visits to defendant. In response to these threats, defendant bought a Taurus .357 magnum to protect himself from Shamberger.

On the way back to defendant's house following the custody hearing, defendant told Volarvich that he could "take care of" Shamberger as payment for defendant having bailed Volarvich out of jail. When Volarvich remarked that he "needed a piece," defendant replied he "had that taken care of." Volarvich asked: "[D]o you want Michelle done?" Defendant said no. Upon arriving at the house, the threesome again got high, and defendant gave Volarvich the .357 magnum Taurus revolver and $400 to pick up some more methamphetamine in Roseville.

At this point, Volarvich and Pina got into a heated argument. Volarvich called Montgomery, arranged to go to her house, and left defendant's house alone. He then picked up Montgomery and drove to a hotel in Rocklin. En route, Volarvich told Montgomery that defendant had given him a gun because defendant "wanted [Shamberger]

taken out." After checking into a hotel room,[1] Volarvich pulled defendant's gun out of a black bag to show Montgomery and started playing with the revolving chamber. Later that night, Volarvich and Montgomery went to Wal-Mart, where Volarvich bought a laser sight. Back at the hotel room, Volarvich unsuccessfully attempted to attach the laser sight to the gun with electrical tape. He then tried to Super Glue the laser sight to the gun; this attempt also failed. Because Volarvich was afraid of sleeping past check-out time and being sent back to jail, he and Montgomery stayed up all night.

After leaving the hotel the morning of November 17, Volarvich and Montgomery went to a friend's house and smoked methamphetamine. They then drove back to Montgomery's house in Woodland. As Volarvich drove across the I-5 causeway, he pulled out the gun and started playing with the revolving chamber, spinning the chamber and loading it with bullets. Afraid she would get in trouble because Volarvich was playing with a gun while they drove down the causeway, Montgomery told him to put the gun down. Volarvich complied, placing it on the driver's side floorboard. They smoked more methamphetamine when they arrived at Montgomery's house.

Meanwhile, Pina was still at defendant's house. Furious that Volarvich had not returned with the methamphetamine he was supposed to buy the night before, defendant hit Pina in the head to rouse her

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[1] Volarvich and Montgomery were not old enough to rent the hotel room. Thus, Volarvich called an older friend, Ryan Nicholson, and arranged for Nicholson's girlfriend, Erin Owen, to rent the room in exchange for gas money.

from sleep and yelled that, because of her, Volarvich did not come back and that defendant "was out $400 plus the money for the bail bondsman." Unable to connect with Volarvich through his cell phone, Pina called Montgomery, told her that defendant had hit her because Volarvich had not returned, and asked if she had heard from him. Montgomery told Pina that she would "try to get ahold of him." At Montgomery's request, Volarvich called Pina and told her that he was on his way to pick her up.

When Volarvich left Montgomery's house, he was "upset" that defendant had hit Pina. Volarvich brought the gun with him because "he was worried that it was going to be a setup" and he did not want to go back to jail. According to Montgomery, Volarvich believed that either defendant or the bail bondsman was setting him up because he had taken defendant's $400 without returning with the methamphetamine and had not met with the bail bondsman the day before to sign the bond paperwork.

Apparently on his way to defendant's house to pick up Pina, Volarvich used defendant's .357 magnum revolver to shoot and kill Officer Stevens, after Volarvich was pulled over by Stevens.

After the shooting, Volarvich called Montgomery, said that he "fucked up," asked if she could hear sirens, but hung up the phone before explaining further. When Volarvich called Montgomery back, he asked her to pick him up on El Dorado Drive. She agreed, borrowed a friend's car, and found Volarvich standing behind his car holding the license plate. Volarvich and Montgomery then switched cars and drove a short distance to Delta Drive, where they left Volarvich's car and returned to Montgomery's house. On the way to the house,

Montgomery noticed that the black bag which had contained the gun was missing. When she asked Volarvich what had happened to it, he explained that he "had to get rid of the gun" and buried it near County Road 96 and County Road 24, which is precisely where the gun was found the next day. Montgomery also overheard Volarvich on the phone telling his mother that he had "shot the cop" but "didn't know if he was serious or not" and thought that "he was just tweaking." Volarvich then called two friends and secured a ride from Woodland to Roseville. During the drive, Volarvich again said he "had shot a cop," and added he did so because "he didn't want to go to jail."

When defendant told Pina an officer had been shot, she turned on the television and saw the news broadcast about the killing. She asked whether he had given Volarvich his gun. Defendant replied that Volarvich's "mentality was there."

Meanwhile, Montgomery received a call from Volarvich telling her to buy window decals to disguise his car. Acceding to Volarvich's request, Montgomery bought decals and window tinting from Wal-Mart, returned to Delta Drive to retrieve the car, and reattached the license plate that Volarvich had apparently removed. After receiving another call from Volarvich informing her where to meet him, Montgomery drove Volarvich's car back to the hotel in Rocklin.[2] There, Volarvich confessed to Montgomery, explaining

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[2] Volarvich again rented the hotel room through Nicholson and Owen, and told them he "killed an officer" and that he "fucked up" and "blasted him in the face." He also told Nicholson that the reason he shot Officer Stevens was that defendant "didn't want to go back to jail."

that when he was pulled over by Officer Stevens, "he just turned and shot him." According to Volarvich, he was "scared" because he "didn't want to go to jail" and believed that being pulled over was part of a set-up orchestrated by the bail bondsman.

Volarvich and Montgomery were arrested at the hotel during the early morning hours of November 18, the same day that defendant was arrested after his house was searched and officers discovered a rifle, methamphetamine, and drug paraphernalia. During questioning, defendant confirmed the antagonistic relationship between himself and Shamberger, and admitted that he had purchased the Taurus .357 magnum revolver in order to protect himself from Shamberger. But he denied asking Volarvich to kill Shamberger and denied giving Volarvich the gun that killed Officer Stevens. According to his version of events, defendant merely showed Volarvich the gun the night before the shooting and discovered that it was missing the next morning.

DISCUSSION

I

Defendant asserts that his murder conviction must be reversed because the shooting of Officer Stevens was not in furtherance of the conspiracy to kill Shamberger and "was both unforeseen and unforeseeable." Defendant is mistaken.

The law has been settled for more than a century that each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of

their common unlawful design. (*People v. Medina* (2009) 46 Cal.4th 913, 920; *In re Hardy* (2007) 41 Cal.4th 977, 1025-1026; *People v. Smith* (1966) 63 Cal.2d 779, 794; *People v. Harper* (1945) 25 Cal.2d 862, 870; *People v. Kauffman* (1907) 152 Cal. 331, 334 (hereafter *Kauffman*); see also *Pinkerton v. United States* (1946) 328 U.S. 640, 647-648 [90 L.Ed. 1489, 1496-1497] (hereafter *Pinkerton*).)

Recognizing that criminal agency poses a greater threat to society than that posed by an independent criminal actor, the law "seeks to deter criminal combination by recognizing the act of one as the act of all." (*People v. Luparello* (1986) 187 Cal.App.3d 410, 437; see also *People v. Zacarias* (2007) 157 Cal.App.4th 652, 658 ["conspiracy to commit a target offense makes it more likely that additional crimes related to the target offense will be committed"].) "In combining to plan a crime, each conspirator risks liability for conspiracy as well as the substantive offense; in 'planning poorly,' each risks additional liability for the unanticipated, yet reasonably foreseeable consequences of the conspiratorial acts, liability which is avoidable by disavowing or abandoning the conspiracy." (*People v. Luparello*, *supra*, 187 Cal.App.4th at p. 438.)

The question whether an unplanned crime is a natural and probable consequence of a conspiracy to commit the intended crime "is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, [the unplanned crime] was *reasonably* foreseeable." (*People v. Medina, supra,* 46 Cal.4th at p. 920.) To be reasonably foreseeable "'"[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . ." [Citation.]'"

(*Ibid.*) Whether the unplanned act was a "reasonably foreseeable consequence" of the conspiracy must be "evaluated under all the factual circumstances of the individual case" and "is a factual issue to be resolved by the jury" (*ibid.*), whose determination is conclusive if supported by substantial evidence. (*Kauffman*, *supra*, 152 Cal. at p. 335; *People v. Luparello*, *supra*, 187 Cal.App.3d at p. 443.)

Properly treating the issue as a question of fact, the trial court instructed the jury with CALCRIM No. 417.[3] After requesting clarification on the meaning of certain language in the instruction ("in order to further the conspiracy" and "likely to happen if

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[3] CALCRIM No. 417, as given to the jury in this case, provides: "A member of a conspiracy is criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan. [¶] To prove that defendant Gregory Fred Zielesch is guilty of [the murder of Officer Stevens], the People must prove that: [¶] One, defendant Gregory Fred Zielesch conspired with defendant Brendt Volarvich to commit the murder of Doug Shamberger; [¶] Two, Brendt Volarvich, as a member of the conspiracy to murder Doug Shamberger, committed the murder of Andrew Stevens in order to further the conspiracy to murder Doug Shamberger; and [¶] Three, the murder of Andrew Stevens was a natural and probable consequence of the common plan or design of the crime that both defendants Zielesch and Volarvich conspired to commit."

nothing unusual intervenes"), the jurors informed the trial court that they had reached verdicts on all counts except the murder charge alleged against defendant.

The trial court then allowed the parties to present supplemental closing arguments focusing solely on whether the murder of Officer Stevens was committed in furtherance of, and followed as a probable and natural consequence of, the conspiracy. The People argued the murder furthered the goals of the conspiracy because, in order to successfully murder Shamberger, one of the goals of the conspiracy had to be to avoid detection; and the murder was a natural and probable consequence of the conspiracy because "a reasonable person would foresee that there would be police intervention" at some point during the execution of the plot to kill Shamberger, and defendant, with actual knowledge of Volarvich's "volatile and unstable" nature, gave him the gun to carry out the murder. Defendant's attorney argued no conspiracy existed between defendant and Volarvich; being pulled over by an officer on a country road in Woodland constituted an "extremely unusual" event, the intervention of which rendered Officer Steven's death not a natural and probable consequence of the alleged conspiracy; and Volarvich killed Officer Stevens because "he did not want to go to jail," not because of a conspiracy to kill Shamberger.

After further deliberation, the jury found defendant guilty of both the conspiracy and murder charges, implicitly finding the murder of Officer Stevens was committed in furtherance of, and followed as a natural and probable consequence of, the conspiracy.

As he did in the trial court, defendant claims the murder of Officer Stevens "was both unforeseen and unforeseeable." We conclude the jury's contrary finding is supported by substantial evidence. The object of the conspiracy between defendant and Volarvich was to end the life of defendant's nemesis with the .357 magnum revolver supplied by defendant for that purpose. Defendant knew Volarvich had a proclivity for using methamphetamine, having used the drug with Volarvich the night before he gave him the gun to carry out the hit, and having given Volarvich $400 to purchase more methamphetamine. Defendant admitted knowing Volarvich had an unstable personality; after receiving news of Officer Stevens' murder, defendant told Pina that Volarvich's "mentality was there." Defendant also had reason to know that Volarvich, who was on searchable probation, would be taken into custody if a law enforcement officer detained him and found the gun. From these facts, the jury could find that a natural and probable consequence, i.e., a reasonably foreseeable "possible consequence" of the defendant's conspiracy with assassin Volarvich to murder Shamberger (*People v. Medina, supra,* 46 Cal.4th at p. 920) was that, if Volarvich were detained by a law enforcement officer before completing the job, Volarvich would kill the officer to avoid arrest and complete his mission to assassinate Shamberger.

Indeed, given defendant's knowledge of Volarvich's unstable mental state, use of methamphetamine, and desire not to return to jail, we conclude the prospect that defendant's arming Volarvich with defendant's .357 magnum revolver to assassinate Shamberger would lead to the shooting of a law enforcement officer is just as foreseeable as was the murder that the California Supreme Court recently held

to be the natural and probable consequence of a "failed assault" by gang members who had been disrespected by a rival gang member. (*People v. Medina, supra,* 46 Cal.4th at 923-925.)

Defendant's argument that the murder of Officer Stevens with defendant's gun was not "in furtherance of the charged conspiracy" does not benefit him for two reasons. First, a natural and probable consequence of a conspiracy need not be an act in furtherance of the conspiracy; it simply must be a "'reasonably foreseeable consequence of the [intended crime] aided and abetted.' [Citation.]" *People v. Medina, supra,* 46 Cal.4th at p. 920.) Second, although Volarvich was not on his way to carry out the assassination of Shamberger when Volarvich was pulled over by Officer Stevens, and although there is evidence that Volarvich was upset with defendant for hitting Pina, the jury was not required to conclude that the conspiracy to murder Shamberger had reached an end. Volarvich still "owed" defendant for bailing him out of jail and for the $400 given to him the previous day to purchase methamphetamine, and Volarvich still possessed the gun given to him by defendant to assassinate Shamberger. Thus, the jury could reasonably have concluded that the conspiracy to murder Shamberger persisted despite Volarvich's anger at defendant, and that the hit would be carried out whenever the opportunity presented itself. The jury could also have concluded, quite reasonably, that a simultaneous goal of the conspiracy to assassinate Shamberger was to avoid detection and forcibly resist arrest. (*People v. Durham* (1969) 70 Cal.2d 171, 185; *People v. LaPierre* (1928) 205 Cal. 470, 471.) In fact, when Volarvich was pulled over by Officer Stevens, he correctly concluded that, unless he took drastic action with

the gun given to him by defendant, Volarvich was going back to jail. Thus, the jury could reasonably have found that, because Volarvich would not have been able to complete his assignment from a jail cell, avoiding arrest at any cost furthered the murderous goal of the conspiracy by giving Volarvich more time to find the target.

Defendant points out "there appear to be no cases like this one," and posits the reason for the dearth of appellate decisions dealing with this factual scenario is "this case is far outside the scope of Kauffman and Pinkerton." (*Kauffman, supra,* 152 Cal. 331; *Pinkerton, supra,* 328 U.S. 640 [90 L.Ed. 1489].) We are not persuaded. While it may be possible to imagine scenarios in which the conduct of an assassin is so outrageous and unpredictable that it falls outside the scope of a conspiracy to commit murder, one who bargains for an assassin's services, and then arms the assassin with a gun, takes the assassin as he finds him. If the hired killer is an unstable methamphetamine user who, before the assassination is completed, finds it necessary to kill a law enforcement officer to avoid being sent back to jail, the conspirator who hired and armed the assassin is guilty not only of conspiracy to murder the intended target, but also the murder of the peace officer. It would be a rare case indeed where a murder is an unforeseeable result of a conspiracy to commit murder.

II*

Defendant also contends the trial court should have excluded Volarvich's out-of-court statement that defendant gave him a gun because he wanted Shamberger killed. The court allowed the statement to be introduced as a declaration against Volarvich's penal interest

(Evid. Code, § 1230), citing *People v. Samuels* (2005) 36 Cal.4th 96 (hereafter *Samuels*). Defendant believes "Volarvich's identification of [defendant] as the person who gave him the gun was not against his penal interest; it was collateral, and should have been excluded." We disagree.

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or *so far subjected him to the risk of civil or criminal liability*, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230, italics added.) "With respect to the penal interest exception, the proponent of the evidence 'must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

In this case, Volarvich's exercise of his privilege against self-incrimination made him unavailable as a witness. (*People v. Duarte*, *supra*, 24 Cal.4th at pp. 609-610.) And his out-of-court statement (that defendant had given him a gun because he "wanted [Shamberger] taken out") implicated Volarvich in a conspiracy

to commit murder. Defendant asserts, however, that Volarvich's identification of him as the provider of the gun was a collateral statement not specifically disserving to Volarvich's penal interests and, thus, should have been excluded by the trial court.

The penal interest exception is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441 (hereafter *Leach*).) This is so because "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." (*Williamson v. United States* (1994) 512 U.S. 594, 599-600 [129 L.Ed.2d 476, 482-483] [interpreting rule 804(b)(3) of the Federal Rules of Evidence in the same manner as the California Supreme Court interpreted Evidence Code section 1230 in *Leach*].) Nevertheless, statements that are "truly self-inculpatory, rather than merely attempts to shift blame or curry favor" (*Williamson v. United States*, *supra*, 512 U.S. at p. 603 [129 L.Ed.2d at p. 485]), are admissible under Evidence Code section 1230 even though they also implicate others in the crime (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121).

Samuels held admissible against Samuels an out-of-court statement made by her hired assassin (Bernstein), who volunteered to an acquaintance that the assassin "'had done it,'" that another man "'had helped him',' and that defendant "'had paid him.'" (*Samuels, supra*, 36 Cal.4th at pp. 120-121.) As the California Supreme Court

explained, "Bernstein's facially incriminating comments were in no way exculpatory, self-serving, or collateral." (*Id.* at p. 120.) The part of the statement also implicating Samuels "was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing--a particularly heinous type of murder--and in a conspiracy to commit murder." (*Id.* at p. 121.) Viewing the totality of the circumstances, the Supreme Court held the reference to Samuels' involvement was "inextricably tied to and part of a specific statement against penal interest." (*Ibid.*)

Similarly, Volarvich told Montgomery, a recent acquaintance with whom he was about to engage in an intimate relationship, that defendant had given him a gun because defendant "wanted [Shamberger] taken out." This statement was profoundly disserving to Volarvich's penal interests as it implicated him in a conspiracy to commit murder and admitted an overt act in furtherance of the conspiracy, i.e., the passing of the gun from defendant to Volarvich. Like the statement in *Samuels*, Volarvich's facially incriminating statement was not exculpatory, self-serving, or collateral. And because the passing of the gun from defendant to Volarvich was alleged as the overt act in furtherance of the conspiracy, the reference in the statement to defendant giving him the gun to kill Shamberger was an inextricable part of the statement implicating Volarvich in the conspiracy to commit murder.

Defendant's reliance on *Leach* is misplaced. As noted in *People v. Miranda* (2000) 23 Cal.4th 340, at page 352, the Supreme Court in *Leach* observed that the reliability of a statement against penal interest is limited to the part of the statement "that was indeed

'disserving to the interests of the declarant'" and the hearsay exception is "inapplicable to collateral, nondisserving assertions within the declaration." In *Samuels*, the Supreme Court clarified that a statement, volunteered to an acquaintance, implicating the declarant in a conspiracy to commit murder is specifically disserving to the interests of the declarant, and is admissible under the penal interest exception even if the statement also implicates others in the conspiracy. (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.)

So it was in this case. Therefore, the trial court did not err in allowing the statement to be presented to the jury.

III*

Defendant further claims his conspiracy conviction must be reversed because "there is insufficient evidence of the overt act" alleged by the People, i.e., that defendant gave Volarvich the gun to kill Shamberger. This is so, he argues, because Montgomery was "an admitted accomplice" whose uncorroborated testimony supplied "the only evidence" that defendant gave Volarvich the gun. Not so.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, superseded by statute on another ground as stated in *Verdin v.*

Superior Court (2008) 43 Cal.4th 1096, 1106; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].)

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.) To be subject to prosecution for the same offense, the witness must have "'directly commit[ted] the act constituting the offense, or aid[ed] and abet[ted] in its commission, or, not being present, have advised and encouraged its commission . . . .'" (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114; Pen. Code, § 31; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834.) "A mere accessory, however, is not liable to prosecution for the identical offense, and therefore is not an accomplice." (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114.)

In defendant's view, "Montgomery is clearly an accomplice: she and Brendt Volarvich 'knowingly, voluntarily, and with common intent . . . unite[d] in the commission of the crime'" of conspiracy to murder Shamberger. Specifically, defendant asserts that Montgomery, with knowledge of Volarvich's agreement to kill Shamberger, acted as Volarvich's accomplice by assisting him in buying the laser sight at Wal-Mart, an act the People argued showed Volarvich's determination to carry out the hit on Shamberger. We are not persuaded.

The crime of conspiracy requires "dual specific intents: a specific intent to agree to commit the target offense, and a specific intent to commit that offense." (*People v. Jurado* (2006) 38 Cal.4th 72, 123; *People v. Williams* (2008) 161 Cal.App.4th 705, 710.) The record contains no evidence that Montgomery possessed either the specific intent to agree to kill Shamberger or the specific intent to carry out the agreed-upon murder. At most, the record reveals that Montgomery, after having been told defendant gave Volarvich a gun to kill Shamberger, accompanied Volarvich to Wal-Mart, where he purchased the laser sight while she purchased a razor, deodorant, and shampoo. Montgomery did not go to the counter with Volarvich while he picked out the laser sight, and she "thought he was just tweaking." When they returned to the hotel room, Montgomery did her homework while Volarvich unsuccessfully attempted to attach the laser sight to the gun with electrical tape and then with Super Glue. While Montgomery did assist Volarvich to some extent by pointing out that he had the laser sight "backwards or upside down," and "flipped it around" for him, this does not give rise to a reasonable inference that Montgomery shared Volarvich's dual intent to agree to kill Shamberger and accomplish the end result of Shamberger's demise. (See *People v. Lewis* (2001) 26 Cal.4th 334, 369-370 [evidence suggesting involvement in robbery and murder held to be too speculative to support inference that prosecution witness was accomplice].)

In any event, even if Montgomery was an accomplice to the conspiracy to commit the murder of Shamberger, substantial evidence supports defendant's conviction for conspiracy because Montgomery's

testimony establishing the overt act alleged by the People was sufficiently corroborated.

"Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1228.) Such corroborating evidence "may be circumstantial in nature, and may consist of evidence of the defendant's conduct or his declarations." (*People v. Garrison* (1989) 47 Cal.3d 746, 773.)

Pina testified defendant told Volarvich that Volarvich could "take care of" Shamberger as payment for defendant bailing him out of jail, that Volarvich responded by saying he "needed a piece," and that defendant replied he "had that taken care of." Even defendant's account of events, related to detectives following his arrest, placed him in his bedroom showing Volarvich the gun. Defendant admitted his hatred for Shamberger, a man who was intimately involved with defendant's wife and who, defendant suspected, had conspired with defendant's wife to burglarize his house. Defendant also admitted he purchased the gun to protect himself from Shamberger following several threats and, shortly thereafter, Volarvich left defendant's house with the gun. This evidence--direct evidence of the agreement to kill Shamberger, and circumstantial evidence that defendant supplied the gun in furtherance of the conspiracy--is sufficient to corroborate Montgomery's testimony that Volarvich told her defendant gave him the gun to kill Shamberger.

In short, although the record contains overwhelming evidence that Montgomery's actions following the murder of Officer Stevens made her an accessory after the fact, a crime for which she was convicted, there is nothing but speculation to support defendant's claim that Montgomery operated as an accomplice to the conspiracy to murder Shamberger. In any event, Montgomery's testimony was corroborated by independent evidence implicating defendant in the crime.

IV*

Although defendant did not request instructions on matters the jurors should consider with respect to accomplice testimony (CALCRIM No. 334), he now argues the trial court erred by failing to give the instructions sua sponte. The contention fails because, as we have explained, there was no evidence to support a determination that Montgomery was an accomplice to the conspiracy to murder Shamberger. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114 ["if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony"].)

V

We also reject defendant's claim that his right to a fair trial was infringed because, for a period at the start of trial, the judge allowed courtroom spectators to wear buttons displaying a photograph of Officer Stevens.

A

On the first day of trial, Wednesday, February 13, 2008, Volarvich's counsel brought to the court's attention that "some folks in the audience are wearing buttons, which fairly bear the image of Officer Stevens." Understanding their desire to "express their sympathy for Officer Stevens and his family," counsel voiced concern that the buttons "may have some undue influence on the jurors." Thus, counsel asked the court to "direct folks, if they are going to be members of the audience, to please remove those buttons."

The following day, Thursday, February 14, 2008, outside the jury's presence, the trial judge described the button: "It is about two to two-and-a-quarter inches in diameter. It is a color photograph of Officer Stevens. I can't tell if he's in uniform or not. It is from chest level up showing primarily his face with the American flag in the background. And then it says Officer Andrew Stevens." The judge then allowed counsel to address the issue. Citing the United States Supreme Court's decision in *Carey v. Musladin* (2006) 549 U.S. 70 [166 L.Ed.2d 482]), Volarvich's attorney said "it is an open question whether or not a spectator as opposed to state conduct in the courtroom can violate the right to a fair trial," but argued the fact that "these badges have been passed out by the Highway Patrol" satisfied any state action requirement. After Volarvich's counsel offered to submit evidence regarding the California Highway Patrol's involvement in distributing the buttons, the judge said that he was not concerned about whether a state actor distributed the buttons. This was so because the judge rejected

the notion that "if state action isn't involved in wearing buttons or having placards or anything of that nature, then the Court has no authority and/or responsibility to control what happens in the courtroom." Rather, the judge explained, his "responsibility and the responsibility of all the security staff is to make sure that we maintain the kind of decorum in the courtroom that we should have for a case of this gravity."

Accordingly, the judge framed the issue as "whether or not the communication from members of the audience is in any sense coercive or intimidating so that it might affect the decisions that the jury has to make in this case." In this regard, the judge observed that the buttons did not relate "overtly to the subject matter of this trial" and served only as "a memorial or an expression of sympathy" for Officer Stevens and his family. The judge also noted that such an expression of sympathy was not inconsistent with the defense of either Volarvich or defendant as both defense attorneys, in opening statements, described the death of Officer Stevens as "tragic or sad," and neither suggested that the death was not a "homicide of some sort."

Thus, the judge "decided [to] follow a suggestion that was made [in *People v. Houston* (2005) 130 Cal.App.4th 279]" and instruct the jurors as follows: "I want to make sure that you realize that nothing that the audience says or does -- in fact, nothing that anybody does who's not a sworn witness can be used as evidence in this case, so realize that that badge is no more evidence than anything else that you might see on the street or anywhere else. I've already told you that you can only use the testimony and

evidence that's admitted here in court, and that does not include any communication that you might get from the badges themselves; but there's a second issue that could conceivably arise by seeing the badges. [¶] You might feel sympathetic or even empathetic in reaction to seeing Officer Stevens' photograph. Remember that your responsibility when you deliberate in this case is to make your decisions without any [e]ffect from sympathy or passion or prejudice. Those decisions have to be impartial, objective decisions, so I want to make sure that you're sensitized to the fact that sympathy can't play any part in decisions that you ultimately have to make in this case."

The judge also set a deadline after which the buttons would no longer be worn "so that there won't be any ongoing [e]ffect on the jurors." Outside the presence of the jury, the judge informed the audience that, beginning Tuesday, February 26, 2008, the buttons would no longer be allowed into the courtroom. Prior to the court-imposed deadline, the jury was exposed to the buttons bearing Officer Stevens' likeness on the first six days of an eight-week trial.

B

Defendant contends the trial court's "failure to stop the wearing of the buttons when first requested by the defense was error" that deprived him of his right to "a trial before an impartial jury untainted by an inflammatory courtroom atmosphere." We disagree.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." (*Estelle v. Williams* (1976) 425 U.S.

501, 503 [48 L.Ed.2d 126, 130]; *People v. Taylor* (1982) 31 Cal.3d 488, 494.) Because the presumption that a defendant is innocent until proved guilty is a "basic component of a fair trial under our system of criminal justice," "courts must be alert to factors that may undermine the fairness of the fact-finding process" and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (*Estelle v. Williams*, *supra*, 425 U.S. at p. 503 [48 L.Ed.2d at p. 130].)

"Some courtroom practices are so inimical to the presumption of innocence that they violate defendants' due process rights. Compelling a defendant to appear at trial in prison garb is impermissible because the constant reminder of the defendant's incarcerated status may affect jurors' perception of him or her as a wrongdoer. [Citations.] Unnecessary shackling or gagging of a defendant during trial is improper for the same reason. [Citations.] The deployment of excessive numbers of security personnel in a courtroom also can undermine the presumption of innocence. [Citations.]" (*U.S. v. Olvera* (9th Cir. 1994) 30 F.3d 1195, 1196; *Holbrook v. Flynn* (1986) 475 U.S. 560, 567-568 [89 L.Ed.2d 525, 533-534]; *Estelle v. Williams*, *supra*, 425 U.S. at p. 504 [48 L.Ed.2d at p. 130].)

On the other hand, allowing some courtroom spectators to wear commemorative buttons depicting the likeness of a fallen officer is not unduly suggestive of guilt. Defendant's claim to the contrary is an insult to the intelligence, integrity, and resolve of jurors. Here, there is no reason to believe that the

jurors, when faced with the image of a fallen officer, would be unable or unwilling to base their verdict solely on the evidence presented during the trial.

Moreover, jurors were instructed by the court to disregard the buttons, to not allow sympathy for Officer Stevens to play a role in their decision regarding the guilt or innocence of either defendant, and to base their verdict solely on evidence presented during the trial. We presume that the jury followed this admonition. (*People v. Houston*, *supra*, 130 Cal.App.4th at p. 312 [nearly identical admonition held to cure any inherent prejudice presented by nearly identical buttons worn by audience members].) In addition, the court barred the wearing of the buttons during the last five weeks of trial.

Consequently, we conclude the wearing of the buttons presented no "probability of deleterious effects" on the defendant's right to a fair trial. (*Estelle v. Williams*, *supra*, 425 U.S. at p. 504 [48 L.Ed.2d at p. 130].) Simply stated, we find beyond a reasonable doubt that the verdicts would have been the same even if the court had precluded spectators from wearing the buttons at the beginning of the trial.

VI*

We also disagree with defendant's claim that the trial court deprived him of his Sixth Amendment right to present a defense by declining to grant immunity to Shamberger after he asserted his Fifth Amendment privilege against self-incrimination.

A

Shamberger was initially subpoenaed by the People to testify about his relationship with defendant's wife, Michelle, and about conversations he had with defendant regarding that relationship. However, Shamberger's attorney informed the court that Shamberger was "adamant" about asserting his Fifth Amendment privilege and any questions about the nature of his relationship with Michelle could "substantiate one of the elements of the [infliction of corporal injury on a cohabitant] charge" then pending against Shamberger in which Michelle was the alleged victim. His attorney also explained that Shamberger was facing additional charges in seven open cases set for trial in Yolo County, and any impeachment would tend to incriminate him in these additional cases. The prosecutor conceded that Shamberger's testimony "may very well incriminate him" and informed the court that immunity would not be offered. The court sustained Shamberger's assertion of his Fifth Amendment privilege.

During the defense case, defense counsel asked the court for permission to call Shamberger as a witness to testify about (1) his belief that defendant "was not out to harm him," (2) the fact that he and defendant parted amicably after he helped defendant fix his car about a week prior to the shooting, (3) his belief that Pina was lying about the conspiracy, and (4) his claim Pina said to him that Volarvich had defendant's gun because he planned to "rip off" defendant. The prosecutor then indicated that cross-examination of Shamberger would include questioning concerning his history with defendant, including the burglaries for which defendant claimed Shamberger was responsible, and would explore any other illegal

activities Shamberger was engaged in, which could provide a motive for him to lie about his supposedly relationship with defendant.

The trial court again sustained Shamberger's assertion of his Fifth Amendment privilege. In response, Volarvich's attorney offered the "observation" that the court should independently grant Shamberger immunity because the prosecutor's failure to offer immunity constituted an act of "bad faith" and deprived both defendants of due process. The court denied the request, finding it did not have the authority to independently grant Shamberger immunity or to order the prosecutor to do so.

B

The Legislature has conferred upon the prosecution, not the courts, the power to grant immunity. (Pen. Code, § 1324; *People v. Stewart* (2004) 33 Cal.4th 425, 468.) The California Supreme Court has declined to squarely address the issue whether a court possesses the inherent authority to grant immunity to a witness called by the defense; but it has characterized the proposition as "doubtful." (*People v. Lucas* (1995) 12 Cal.4th 415, 460.) Many years earlier, the court acknowledged it is "possible to hypothesize cases" in which "a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial." (*People v. Hunter* (1989) 49 Cal.3d 957, 974.) Even if a judicial immunity power exists, the court noted it should be limited to two circumstances: "'the proffered testimony [is] clearly exculpatory; the testimony [is] essential; and there [is] no strong governmental interests which countervail against a grant of immunity"; or the prosecutor

intentionally refuses to grant immunity to a key defense witness "'with the deliberate intention of distorting the judicial fact finding process'" by suppressing essential, noncumulative exculpatory evidence. (*People v. Hunter*, *supra*, 49 Cal.3d at pp. 974-975; *People v. Stewart*, *supra*, 33 Cal.4th at p. 470.) "'[T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*People v. Hunter*, *supra*, 49 Cal.3d at p. 974, quoting *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964, 972.)

Defendant has failed to carry such a burden. Shamberger's testimony was neither clearly exculpatory nor essential to this case. Even assuming that evidence of Shamberger's "belief" that defendant was not out to harm him and "belief" that Pina was lying about the conspiracy was otherwise admissible, such belief and the other information in the offer of proof were not exculpatory and essential to defendant's case.

At most it would have served to impeach the credibility of one of the prosecution's witnesses. While it would be exculpatory in the broadest sense of the term because it marginally "'tend[s] to clear [defendant] from alleged fault or guilt'" (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 377), in the context of immunity, the term "clearly exculpatory" does not encompass impeachment evidence. (*People v. Hunter*, *supra*, 49 Cal.3d at p. 974 ["'Immunity

will be denied if the proffered testimony is found . . . to relate only to the credibility of the government's witnesses'"].)

And the proffered evidence was not essential to defendant's case because it was cumulative of other evidence introduced during the trial. Jacob Campos, one of Pina's friends, testified Pina told him that "[defendant] had not hired [Volarvich] to go after Shamberger," and that "[Volarvich] was on his way to [defendant's] house to pick her up at the time" Officer Stevens was killed. According to Campos, Pina said "there was never any agreement to kill [Shamberger]"; she stole the gun from defendant and gave it to Volarvich; and she was "mad" at defendant for hitting her and "was going to do anything she could to put him away." Both Teresa Williams and Danny Byrd, acquaintances of Pina, testified Pina told them that Volarvich was not planning to shoot Shamberger, but instead was going to shoot defendant for hitting her. Joshua Sims, another of Pina's acquaintances, testified that he overheard Pina at a party saying she "'really got him good,' talking about [defendant]," and that Pina is "probably the most scandalous woman I know." Sims also told defendant's investigator that Pina told him Volarvich was on his way to defendant's house to "kill him with his own gun" when he was pulled over by Officer Stevens.[4]

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[4] Sims also told defendant's investigator that Pina claimed to have been in the car with Volarvich when he shot Officer Stevens and "jumped out of the car and ran away" following the shooting, which was contradicted by eyewitness accounts of the shooting, none of which described a passenger jumping out of the car and running away.

In light of this evidence impeaching Pina with a series of prior inconsistent statements, evidence that Shamberger believed Pina to be lying about the conspiracy and that Volarvich had the gun to rob defendant was not essential to defendant's case.

Also not essential to defendant's case was the proffered evidence that, based in part on a meeting the two had roughly a week before the shooting, Shamberger believed that defendant was not conspiring to kill him. Again, the defense proffered an assortment of witnesses who testified to Pina's statements that there was never a conspiracy to kill Shamberger. Because Pina was the witness who testified to the conversation between defendant and Volarvich concerning the plot to kill Shamberger, her out-of-court statements denying the existence of such a plot were more helpful to defendant's case than would have been Shamberger's testimony about his *belief* that defendant would not have conspired to kill him based on a friendly encounter he had with defendant a week prior to the shooting.

Nevertheless, defendant relies on the second circumstance in which it could be argued the court should have granted immunity, i.e., whether "'the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,' thereby distorting the judicial factfinding process." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 470, quoting *People v. Hunter*, *supra*, 49 Cal.3d at p. 975.) He argues that, "[b]ecause the assertion of the privilege resulted not from the subject matter of the defense's proposed questioning, but from a proposed extensive cross-examination by the

prosecutors, the court's rulings and the prosecutors' assertion of what amounted to a threat should Shamberger testify combined to deny [defendant] the testimony of an essential witness." We are not persuaded. For the reasons articulated above, Shamberger's testimony would not have been "noncumulative exculpatory evidence." The court's refusal to grant Shamberger immunity did not distort the factfinding process because the substance of Shamberger's intended testimony was covered by other witnesses.

VII*

Finally, we find no merit in defendant's contention that the trial court erred by denying his motion for a new trial based on newly-discovered evidence.

Three witnesses testified for defendant at the new trial motion: Ricky Escobar; Jerry Tuter; and Doug Shamberger, who no longer was asserting his right against self-incrimination. Defendant does not challenge the trial court's finding that the proffered testimony of Escobar and Tuter was known to the defense prior to trial and, thus, was not newly-discovered evidence. His attack on the court's ruling is limited to the proffered testimony of Shamberger.

Specifically, defendant argues the court's ruling that "the proposed testimony of Doug Shamberger was cumulative and would not have been likely to make a different result probable on retrial" was, in his appellate counsel's words, "indefensible" and "denied [defendant] the testimony of a witness who cast doubt on the most important witness for the prosecution, a witness who actually claimed to have heard the defendants conspire to commit murder." He is mistaken.

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

The ruling on a motion for new trial "'"rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328; *People v. McDaniel* (1976) 16 Cal.3d 156, 179 ["A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal"].)

Defendant's new trial motion asserted, among other things, that a letter written by Shamberger and addressed to the court constituted new evidence warranting a new trial. The letter, attached to the motion, expressed Shamberger's belief that Volarvich was on his way to rob defendant when he was pulled over by Officer Stevens because (1) defendant bailed Volarvich out of jail in exchange for Pina's promise to make an "XXX movie" for defendant; (2) Pina told him that she and Volarvich planned to rob defendant; (3) Volarvich had already robbed defendant the night before the shooting, prompting defendant

to hit Pina the next morning, which angered Volarvich; (4) some unspecified people showed up at defendant's house after Pina and Volarvich got to defendant's house to rob him; and (5) to avoid being an accessory to murder, Pina disposed of the gun and fabricated the conspiracy between defendant and Volarvich.

Opposing the motion, the prosecutor argued the letter "offers nothing more than additional impeachment evidence" against Pina; it was "cumulative" because several defense witnesses had already impeached Pina; and the letter is "unreliable and clearly unlikely to produce a different result at re-trial." In reply, defense counsel argued that "testimony did come into evidence concerning statements [Pina made] which contradicted her prior testimony," but the letter was not cumulative-- rather, it was "earth shattering" because Shamberger, "the supposed object of the conspiracy, is stating under penalty of perjury that [Pina] told him [defendant] was not involved as a conspirator and in fact was a would be victim."

In apparent recognition that the import of Shamberger's letter was less than clear, defendant also submitted a declaration from Shamberger acknowledging there was some "friction" between him and defendant because he started dating Michelle while defendant was in the hospital and he had threatened to "kick [defendant's] ass on several occasions." According to the declaration: Shamberger and Michelle met with defendant at defendant's house in October 2005, and "smoked out" together. Defendant told Shamberger to "take care of his wife" for him, after which they shook hands and parted amicably. After this meeting, Shamberger even helped defendant

repair his truck and "shared a six pack of beer." After Officer Stevens was killed, Shamberger met with Pina, who told him that defendant had hired Volarvich to kill Shamberger. Pina also told Shamberger "she had agreed to make a sexual movie for [defendant] in exchange for [defendant] bailing [Volarvich] out of jail." Four or five months later, an emotional Pina told Shamberger that defendant never hired Volarvich to kill him. Instead, she had burglarized defendant's house the night before the shooting, and defendant "slapped her around" when he found out about it; Volarvich "was on his way to get even with [defendant] for slapping her around when he was pulled over by Officer Stevens." Shamberger's testimony at the hearing on defendant's new trial motion largely mirrored that of his declaration and added that Pina told him she had stolen defendant's gun.

In denying the new trial motion, the court concluded that: Shamberger's testimony was newly discovered within the meaning of *People v. Shoals* (1992) 8 Cal.App.4th 475, at page 487, because the assertion of his Fifth Amendment privilege rendered him legally unavailable as a witness during trial; however, the evidence was "cumulative to information that the jury already heard during the course of this lengthy trial"; and, given that Shamberger's testimony was "simply . . . not credible," there was "no likelihood that a second jury would come to a different decision."

The trial court's assessment was not an abuse of discretion. Indeed, defendant's reply memorandum concedes that Shamberger's testimony was duplicative of evidence introduced at trial. And defendant does not point to any authority, and we have found none,

to support his assertion that Shamberger's status as the target of the conspiracy somehow makes his duplicative testimony noncumulative. He cites *People v. Lapique* (1902) 136 Cal. 503 for the proposition that "highly important newly discovered evidence should not be disregarded [as cumulative] because there had been some slight, insignificant and inconclusive evidence introduced at the trial on the same subject." (*Id.* at p. 505.) But that decision does not help defendant because (1) the case involved a forgery prosecution where the People's case was "extremely slight and unsatisfactory," and (2) the trial court denied a motion for new trial despite newly discovered evidence that the prosecuting witness admitted to having signed the note alleged to have been forged. (*Ibid.*) In contrast, the case against defendant was neither slight nor unsatisfactory. To the contrary, the evidence of guilt was strong. And Shamberger's testimony impeaching Pina was not "highly important" in light of the multitude of witnesses who did just that. Simply put, Shamberger's testimony at the new trial motion was "repetitive of evidence already before the jury" (*People v. Evers* (1992) 10 Cal.App.4th 588, 599, fn. 4) and was therefore cumulative.

The trial court was also correct to "'consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.'" (*People v. Delgado*, *supra*, 5 Cal.4th at p. 329, quoting *People v. Beyea* (1974) 38 Cal.App.3d 176, 202.) First, as the trial court pointed out in ruling on the new trial motion, Shamberger's letter submitted to the court was inconsistent with his subsequent testimony as "there is no mention

in that letter about this critical evidence that [Pina] told him that she'd stolen the gun. It is simply not in there at all." Second, while Shamberger's testimony concerning Pina's prior inconsistent statements mirrored that of several other witnesses who testified at trial, his testimony concerning his relationship with defendant was directly contradicted by defendant's own statement to police immediately following the shooting in which defendant called Shamberger an "asshole" and stated, "I don't care for him, no." Defendant also said in this statement to police that the feeling was mutual and that it would "[b]e great" if Shamberger "just went away." While defendant mentioned Shamberger's threats and called him a "thief" and a "liar," there was no mention of this friendly meeting during which they shook hands and went their separate ways.

There being no manifest and unmistakable abuse of discretion, we cannot interfere with the trial court's denial of defendant's new trial motion. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

NICHOLSON, J.

ROBIE, J.